SUPREME COURT
74-826
JAN 2 1975
MICHAEL RODAK, JR.

In the

Supreme Court of the United States

October Term, 1974

No.— A-371

Charles Bergstralh,
Petitioner,

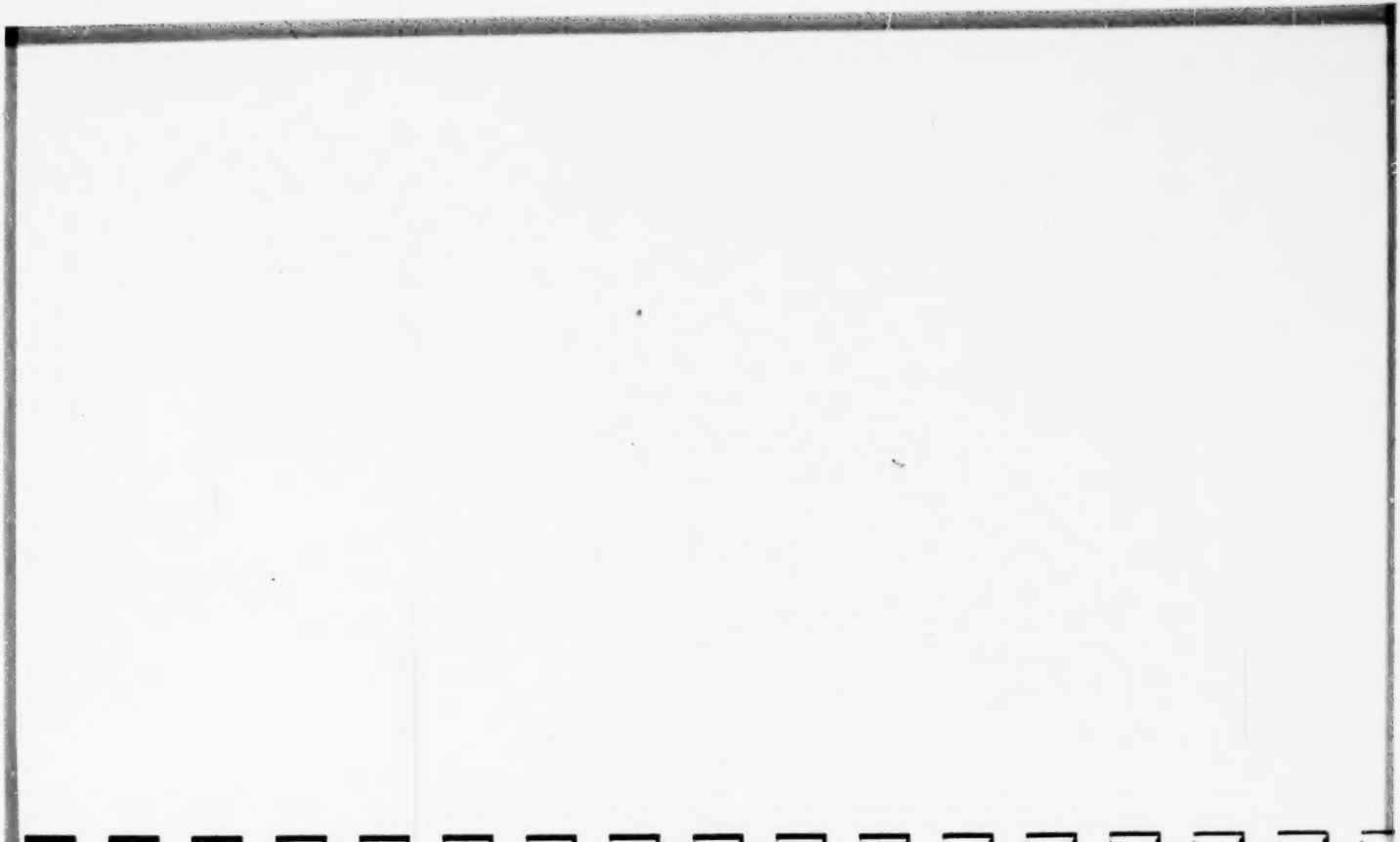
—Against—

Gayle Lowe and City of Bend, Oregon
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Charles Bergstralh
Petitioner
Box 961
Bend, Oregon 97701

December 27, 1974



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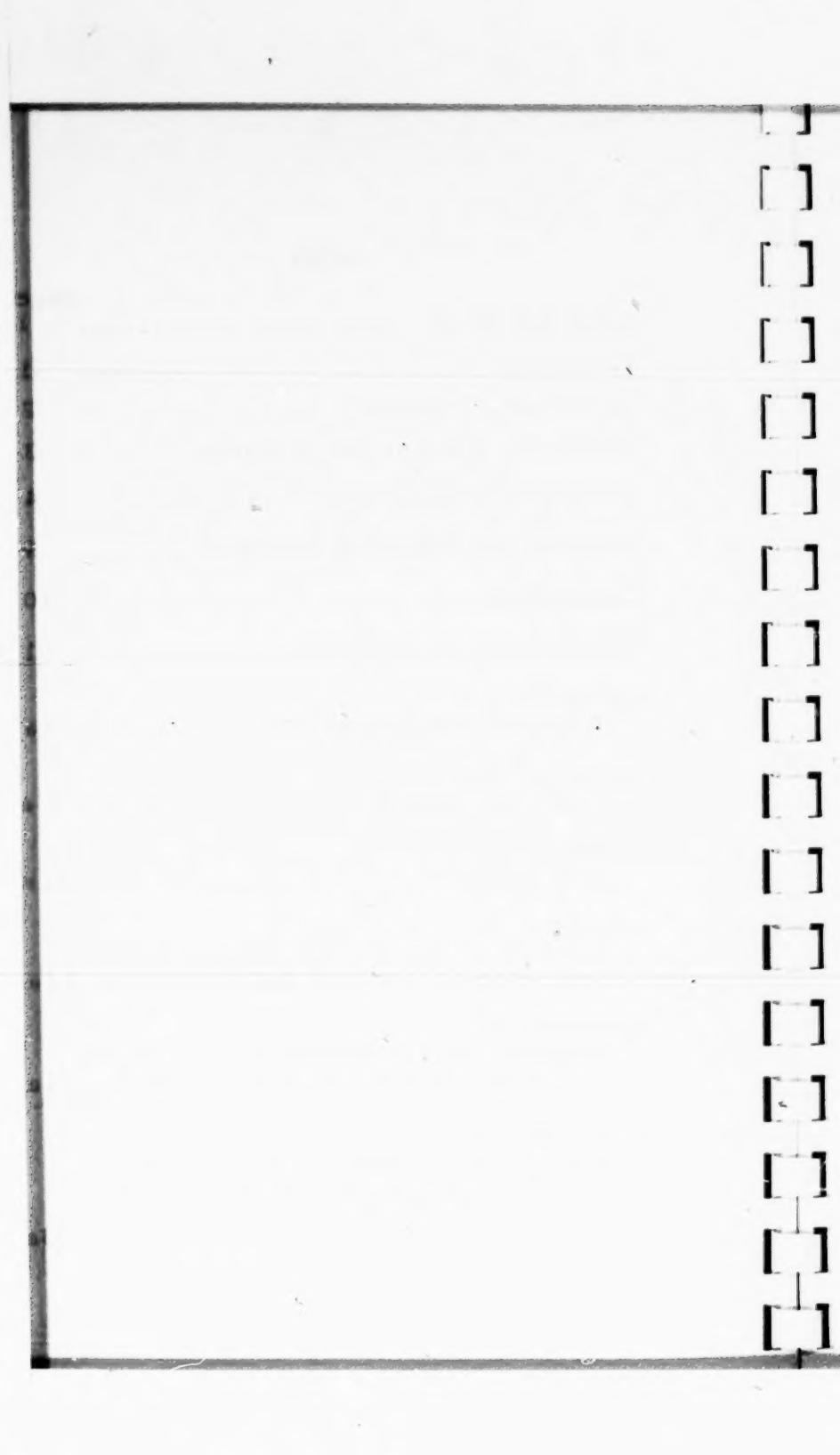

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Gayle Lowe and City of Bend, Oregon
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Charles Bergstralh, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 6, 1974.

Opinions Below

The opinion of the Court of Appeals, appears in the Appendix hereto. Verdict of the District Court contained in separate volume.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 6, 1974. The time to file this petition was extended from November 4,

1974, to January 3, 1975 by order of Mr. Justice Douglas, dated November 6, 1974. (Appendix F) This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether this Court should exercise its supervisory powers over lower federal courts in this case in view that the petitioner's conviction for resisting arrest was obtained by a conspiracy to convict Bergstralh on the part of the police, the city attorney, and municipal court; and, evidence of perjury of the prosecution witness, Jasa in municipal court testimony.

2. Whether there is a real conflict between the decision below and the decision as applied in the Hryciuk v. Robinson presumption at district court which warrants review by this Court?

3. Whether this Court should exercise its supervisory powers over the lower federal courts in this case due to the failure below to give recognition to the confusion and conflicts in the finding of fact, judgment and decision on the double charges against Bergstralh; a 'record' of acquittal at the municipal court level on the resisting arrest charge; the inability to have the appeal heard at the circuit court level because of double jeopardy; the two charges not tried separately, in separate trials thus denying Bergstralh due process and civil rights; and whether all of this does not constitute a fundamental unfairness warranting review by this Court.

4. Whether this Court should exercise its supervisory powers over lower federal courts in this case due to the failure of the district court to allow the plaintiff to establish proof the conviction in the municipal court was obtained by fraud.

Statutory Provisions Involved

United States Code, Title 28:

Section 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

The Constitution of the United States

The Bill of Rights:

Amendment IV and Amendment XIV

Statement of the Case

Petitioner was arrested by city patrolman about midnight May 14, 1969 on his own property inside store for violation of a city ordinance #737 Section 4 Disorderly conduct, complaint #18078. He was also charged with violation of Ordinance #737 Section 10 Resisting complaint #18079.

Petitioner was having a parking lot sale crowded with $65,000. of major appliances and color Tv. At 11:15 p.m. plaintiff's 76 year old father-in-law (Tr 200) stood watch while petitioner got a late lunch at Denny's restaurant a block away. When petitioner returned from lunch, he stayed alone on parking lot. (Tr 175, 269) He saw two men, Bob Jasa and Mike Grant (Tr 57) and their car on his lot; (Tr 175) as Grant was urinating on a new refrigerator. (Tr 175) He ordered them off the property for drinking beer, but Jasa and Grant refused to leave, using obscene language. Neighbor up the street was murdered for only $200 by trespassers, so petitioner was anxious to get them off the property because of all the inventory on the lot.

Respondent was cruising in patrol car as petitioner begged for his assistance to arrest the trespassers for being under the influence and urinating. Trespassers denied drinking. Policeman (22yr? old) look-at Grants I.D. noting he was a minor-but ignored the beer bottles insisting it was all right for them to be drinking as he'd not seen them drinking. They told him the car was broke down so he proceeded to aid them. Respondent noted the smell of beer on their breath. They lived a block away.

Petitioner asked the respondent to look at the bottles, and when he refused, he told them to take their beer bottles with them as he tossed them on his own parking lot. He went into his store angry because of lack of cooperation on the part of policeman.

Policeman forced his way into the store and told petitioner he was under arrest, and was going to jail. Petitioner refused, saying he could not leave all of the merchandise sitting outside unattended as someone could steal it. He said he would go if the respondent would get someone to protect the property. The respondent proceeded with force to take petitioner and he called for the now (three) trespassers and they all jumped on petitioner to handcuff him and knock him down and batter on him. Policeman took Bergstralh to jail, leaving the trespassers to do their thing.

Later, the desk sergeant got the wife to go to the police station and then he went to investigate the situation. He inspected where the bottles were laying on the parking lot of the petitioner in front of the building. He told wife, if he had handled the incident, it would not have happened. Wife told him she would take pictures of the bottles broken.

Municipal judge refused to release the petitioner on his own recognizance so bail had to be posted. Municipal court refused to hear the two charges separately, but put them both into one trial.

Deliberate instructions were made to the jury that they would have to find the de-

fendent (petitioner) guilty of resisting arrest. The then counsel objected but again the court instructed jury that he would accept nothing but a guilty verdict on the resisting arrest charge.

At the municipal trial, Jasa testified they had not been drinking beer. The car had broken down, he claimed. Grant went to Alaska so he did not testify in court.

The jury returned the verdict as they were instructed by the judge- "guilty"of resisting arrest. They found "not guilty on the disorderly conduct.

The judge admonished Bergstralh and he suspended all but $25 of the fine. Then he signed the 'resisting' charge as 'not guilty'. This was the #737 Section 10, of the Resisting complaint # 18079. He signed the #737 Section 4 Disorderly conduct complaint #18078 as guilty. This on July 14, 1969 was exactly 61 days after the arrest.

The then counsel was told to file an appeal immediately. There was thirty days in which to file. On the 29th and 30th days, the attorney assured Bergstralh he had filed the appeal and that the case on appeal would be on the winter docket. Another attorney informed petitioner that the appeal was not on the docket. Wife of petitioner confronted the attorney and he explained the other attorney was responsible. Wife reported all of the attorneys in question to the Oregon State Bar and in the meantime a late filing was accepted by the city. State Bar ethics committee investigated found no unethical conduct.

September 19, notice of appeal was filed. October 15, 1969 order allowing appeal was signed.

Petitioner retained another attorney to handle appeal and he noted the discrepancy in the records.

Bergstralh could not appeal the resisting arrest as the record already showed a not guilty record. He could not have another trial for disorderly conduct as he would have double jeopardy.

The attorneys informed Bergstralh that the judge would probably find him guilty this time and he would have a $1000 fine and a ninety day jail sentence, and would most likely lose his appeal.

Circuit court decided the record of resisting showed a "not guilty" so charge, was dismissed and the fine refunded to Bergstralh. This dismissal was recorded in March 1970.

Proof of fraud in the testimony and coercion used in the municipal court trial is the statement made to the newspaper by the city attorney. He stated that the trespassers had merely rolled their car off to the parking lot. These statements given by the city attorney is further evidence of the conspiracy on the part of the police, the city attorney and the municipal court to have a conviction against Bergstralh, so that the city would not be liable for the imprudent judgment on the part of the arresting officer. The officer made a human mistake, he took sides against the old guy (who was "just a watchman" as he described Bergstralh,) and was

for the trespassers. In his unreasonable reasoning, he could find nothing wrong in the trespassers actions and it was okey for the minor to be in possession. Yet he was supposed to be able to determine a reasonable amount of force to effect an arrest and a supposed resist.

In the district court deposition, Jasa changed his testimony and admitted that he had been drinking. Grant testified that he had been a minor drinking and that he had urinated on the new refrigerator.

A prevailing view in this free country is that a person is innocent until he is proven guilty - not that he must prove it but that the guilt must be proven.

The appeal court says the district court did not err in instructing the jury that reasonable force is determined by what force Lowe believed was necessary. How could he reason reasonable force, when he could not reason the trespassers were trespassing.

The conspiracy of the city police, attorney, and court to cover up an employee' mistake in prudent judgment should not be at the expense of a citizen who has the right to protect his property from would-be invaders, or trespassers.

REASONS FOR GRANTING THE WRIT

1. This Court Should Exercise Its Supervisory Powers Over the Lower Federal Court in This Case.

This Court should in this case exercise its supervisory powers over the lower federal courts. The District Court continued to view the petitioner as "guilty" of the resisting charge even though the city or municipal court used coercion to get a conviction. There is no certainty that the municipal court and the city attorney did not conspire to sign the wrong paper deliberately, to insure Bergstralh from getting a fair trial in a higher appeal. By putting the two charges together, the petitioner would be unable to appeal the case. This tends to show either the absurdity of the charges which are almost the same in this case or the ineptness of the prosecution. Whichever the reason, either is bad and should not be condoned. This does not mention the perjury on the part of the prosecution witness, Jasa. The very fact that the municipal court did not have a transcript was a further effort on the part of the conspirators to deny the petitioner due process.

The perjured testimony although not part of the transcript (since there was none) cannot be disproved. The statement on the part of the city attorney to the newspaper tends to support the inaccuracy of Jasa's testimony.

There was a deliberate change of numbers on the complaint. The tampering is obvious.

CONCLUSION

The issues presented here are of great importance, (They involve the civil rights of a citizen who was wronged by poor judgment of some others) that a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Charles Bergstralh

Charles Bergstralh
Petitioner

Box 961
Bend, Oregon 97701

December 27, 1974

Certificate of Service

I hereby certify that on this 31st day of December, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to:

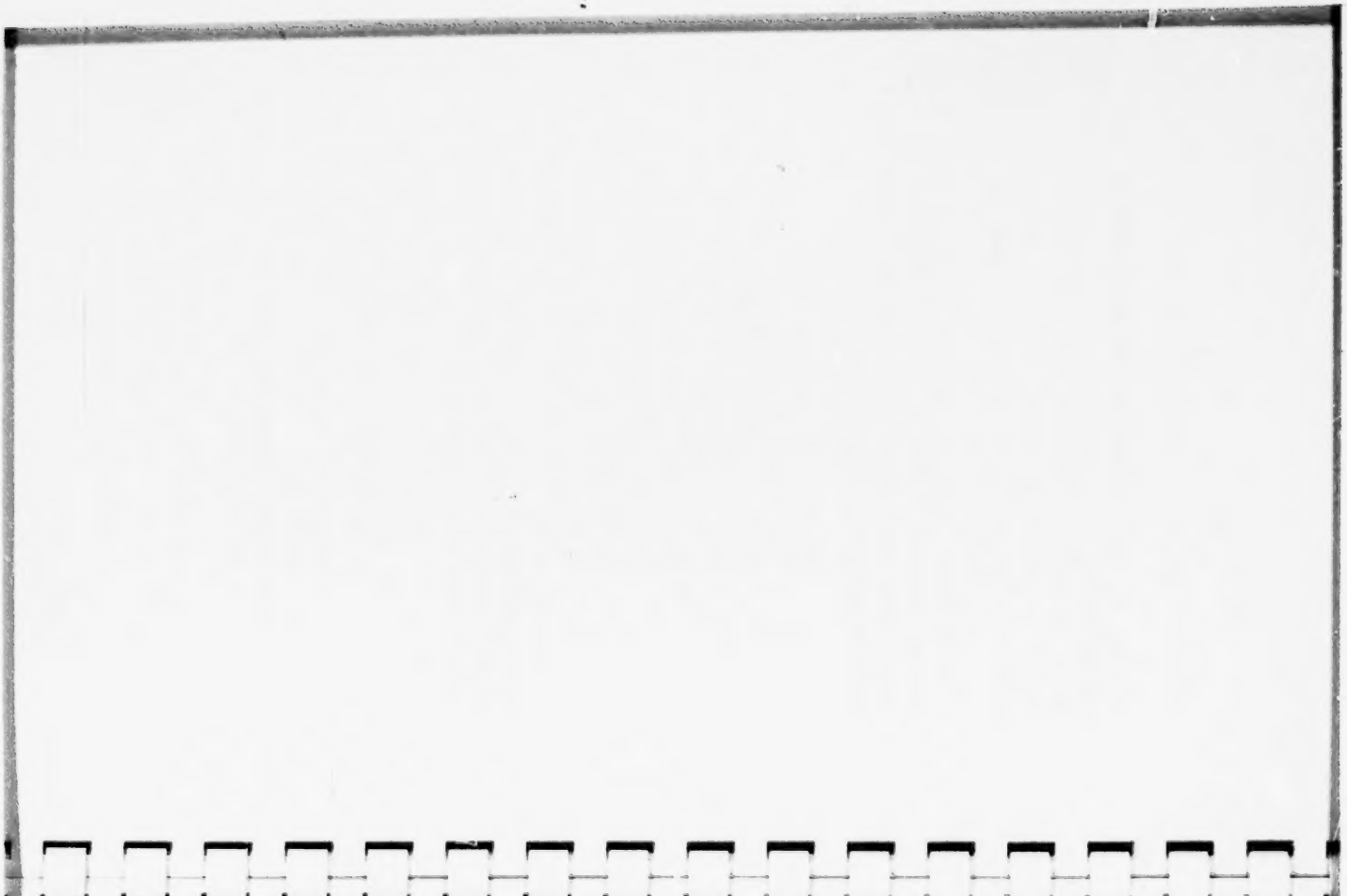
Thomas S. Moore Esq.
Morrison & Bailey
1700 Standard Plaza
Portland, Oregon 97204

Ronald L. Marceau Esq.
Panner, Johnson, Marceau
& Karnopp
1026 Bond Street
Bend, Oregon 97701

the attorneys for the respondent. I further certify that all parties required to be served have been served.

Charles Bergstralh

Charles Bergstralh
Box 961
Bend, Oregon 97701
Petitioner



Form P1

IN THE MUNICIPAL COURT OF THE CITY
OF BEND, DESCHUTES COUNTY, OREGON

CASE NO. 18078 B

CITY OF BEND, PLAINTIFF

Charles Abe Bergstrain, DEFENDANT.

A verified complaint having been duly filed charging the above named defendant with a violation of Section 4 of Ordinance No. NS 737 committed at Bend, Oregon on the 14 day of May, 19 69, and the defendant appearing in the Court in ~~the custody of the Chief of Police~~ and being duly arraigned and advised of his rights, and thereafter the said defendant having entered a plea of Not guilty, and the defendant having been duly convicted before me of the aforegoing charge upon a plea of Not guilty at trial, and the court being now duly advised, it is

ORDERED AND ADJUDGED that the defendant pay a fine of $ 75.00 and Court Costs of $ 2.50, or be committed to the City Jail for a period of _____ days, and in case said fine is not paid, the defendant be confined at the City Jail for a further period of one day for each $5.00 of said fine and subject to labor as by law provided.

Fifty of fine is suspended.

AND THAT THE said defendant be, and he hereby is committed and delivered to the Chief of Police for the execution of this judgment.

7-14-69 F. $75.00 + $2.50 $50.00 Susp.

DATED at Bend, Oregon, this 14th day of July, 1969.

Jury Trial
Finding of guilty

Municipal Judge

PROSECUTION WITNESSES:

DEFENSE WITNESSES:

2a

IN THE MUNICIPAL COURT OF THE CITY
OF BEND, DESCHUTES COUNTY, OREGON

CASE NO. 18078

CITY OF BEND, PLAINTIFF

Charles Abe Bergstrain, DEFENDANT.

A verified complaint having been duly filed charging the above named defendant with a violation of Section 10 of Ordinance No. NS-737 committed at Bend, Oregon on the 14th day of May, 1969, and the defendant appearing in the Court in the custody of the Chief of Police and being duly arraigned and advised of his rights, and thereafter the said defendant having entered a plea of _____ guilty, and the defendant having been duly convicted before me of the aforegoing charge upon a plea of _____ guilty at trial, and the court being now duly advised, it is

ORDERED AND ADJUDGED that the defendant pay a fine of $_____ and Court Costs of $_____, or be committed to the City Jail for a period of _____ days, and in case said fine is not paid, the defendant be confined at the City Jail for a further period of one day for each $5.00 of said fine and subject to labor as by law provided.

AND THAT THE said defendant be, and he hereby is committed and delivered to the Chief of Police for the execution of this judgment.

DATED at Bend, Oregon, this 14th day of May, 1969.

Municipal Judge

PROSECUTION WITNESSES:

DEFENSE WITNESSES:

ORDINANCE NO. NS-737

AN ORDINANCE DEFINING OFFENSES; PROVIDING PENALTIES; AND REPEALING ORDINANCES NO. NS-429, NS-363, NS-531, NS-229, NS-278, NS-95, NS-117, NS-382, NS-494, AND NS-583.

THE CITY OF BEND DOES ORDAIN AS FOLLOWS:

Definitions

Section 1. Definitions. As used in this ordinance, the singular includes the plural and the masculine includes the feminine, and except where the context indicates otherwise, the following shall mean:

(1) City. The City of Bend.
(2) Commission. The City Commission of the City.
(3) Minor. Any person under the age of 21 years, except as otherwise provided.
(4) Person. Every natural person, firm, partnership, association or corporation.
(5) Public place. Any building, street, place or accommodation, whether publicly or privately owned, open and available to the general public.

Offenses Against the Public Peace

Section 2. Assault and Battery. No person shall with or without a weapon attack, assault, or commit a battery upon any other person.

Section 2-A. Harassment. A person commits the crime of harassment if, within intent to harass, annoy or alarm another person, he:

(1) Subjects another to offensive physical contact; or
(2) Publicaly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response; or
(3) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm; or
(4) Engages in a course of conduct that alarms or seriously annoys another person and for which there is no legitimate purpose.

[Section 2-A added by Ord. No. NS- 995 passed November 21, 1973]

Section 3. Public Intoxication. A person commits the crime of public intoxication if he creates, while in a state of intoxication, any disturbance of the public in any public or private business or place.

This ordinance is necessary for the immediate preservation of the public peace, health and safety because the State law has been changed effective July 1, 1972 and this ordinance must conform to State law. Accordingly, an emergency is declared and this ordinance shall become effective July 1, 1972.

[Amended by Ord. No. NS-915 passed June 21, 1972]

Section 4. Disorderly conduct. A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, recklessly creating a risk thereof, he:

(1) engages in fighting or in violent, tumultuous or threatening behavior; or

(2) makes unreasonable noise; or

(3) uses abusive or obscene language or makes an obscene gesture in a public place; or

(4) disturbs any lawful assembly of persons without lawful authority; or

(5) obstructs vehicular or pedestrian traffic on a public way; or

(6) congregates with other persons in a public place and refuses to comply with the lawful order of the police to disperse; or

(7) initiates or circulates a report, knowing it to be false, concerning an alleged or an impending fire, explosion, crime, catastrophe or other emergency; or

(8) creates a hazardous or physically offensive condition by an act which he is not licensed or privileged to do.

[Amended by Ord. No. NS-914 passed June 21, 1972]

Section 5. Drinking in Public Place. No person shall drink intoxicating liquor in a public place unless such place or premises has been licensed by the Oregon Liquor Control Commission to sell intoxicating liquor for consumption on the premises.

Section 6. Disturbance of Lawful Assemblies. No person shall knowingly interrupt, disturb or annoy any lawful assembly, either public or private, by any offensive acts committed within such assembly or so near same as to disturb the order of the meeting.

Offenses Against the Public Safety

Section 7. Concealed Weapons. No person other than an authorized peace officer or person licensed pursuant to law shall carry concealed on or about his person in any manner any revolver, pistol, or other firearm, or any knife, other than an ordinary pocket knife, or any dirk, dagger, stiletto, metal knuckles or any other dangerous weapon by the use of which injury could be inflicted upon person or property.

Section 8. Discharge of Weapons.

(1) No person other than an authorized peace officer shall fire or discharge any gun or other weapon, including spring or air actuated pellet guns, or weapon which propels a projectile by use of a bow or sling, explosives, or jet or rocket propulsion.

(2) The provisions of this section shall not be construed to prohibit the firing or discharging of any weapon:

(a) By any person in the defense or protection of his property, person or family.

(b) At any place duly licensed or designated or commonly used for target practice.

Section 9. Escape of Prisoners from Custody.

(1) No person shall aid or attempt to aid in the escape of a confined prisoner or make available or provide anything calculated to aid in such escape.

(2) No person shall knowingly aid an escaped prisoner by offering shelter, clothing, food or any other thing or service which would aid or abet the escape of such prisoner.

(3) No person shall while in custody or while a prisoner in the City jail or in any other place where City prisoners are kept or confined escape or attempt to escape from such custody or confinement.

Section 10. Interference with Police.

(1) No person shall hinder, delay, obstruct or resist or refuse to assist any police officer or person duly empowered with police authority who is acting in the discharge of his duty.

(2) No person shall offer or endeavor to assist any person in the custody of a police officer or a person duly empowered with policy authority to escape or attempt to escape from such custody.

(3) No person shall address any police officer or person duly empowered with police authority with vile, obscene, profane, insulting or offensive language.

(4) No person shall deliver, by any method whatsoever, any intoxicating liquor or narcotic drug to any person confined in the City jail or attempt to convey or deliver to any such person any article without the permission and consent of the officer in charge.

(5) No person shall impersonate, falsely assume or pretend to be a law enforcement officer.

(6) No person shall operate any generator or electromagnetic wave or any other device or cause a disturbance of such magnitude as to interfere with the proper functioning of any police radio communication system of the City.

(7) No person shall knowingly make or file with the Police Department of the City any false, misleading or unfounded statement or report concerning the commission or alleged commission of any crime.

Section 11. Fire Control.

(1) No person shall intentionally give any false alarm of fire or aid or abet in the commission of such an act.

(2) No person at a fire shall conduct himself in a disorderly manner or refuse to obey promptly any order of any member of the Fire Department or resist, obstruct or hinder any member of the Fire Department. For the purposes of this section all members of the Fire Department are endowed with the same powers of arrest as are conferred upon peace officers for violations of the City ordinances.

(3) No person shall loiter in or about the building or that part of a building in which the publicly owned fire equipment is stored.

Section 12. Criminal use of Drugs.

(1) A person commits the crime of criminal use of drugs if he knowingly uses or is under the influence of a narcotic or dangerous drug, except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer narcotic drugs and dangerous drugs to human beings.

(2) As used in this section, the definition of 'narcotic drugs' in ORS 474.010 and the definition of 'dangerous drugs' in ORS 475.010 are hereby adopted by reference the same as if fully set out herein.

(3) In any prosecution for violation of subsection (1) of this section, it is not necessary to allege or prove what specific drug the defendant used, or was under the influence of, in order to establish a prima facie case. Evidence that the specific drugs was not within the definition of 'narcotic drugs' in ORS 474.010 or the definition of 'dangerous drugs' in ORS 475.010 is a defense.

[Amended by Ord. No. NS- 994 passed November 21, 1973]

IN THE MUNICIPAL COURT OF THE CITY OF BEND
DESCHUTES COUNTY, OREGON

THE CITY OF BEND, a Municipal Corporation, Plaintiff, Vs. CHARLES ABE BERGSTRALH, Defendant.	Case No. TRANSCRIPT ON APPEAL

* * * * * * * * * * * * * * * * *

PAPERS FILED

May 16, 1969	Complaint filed charging disorderly conduct - resisting arrest
July 14, 1969	Trial. Jury verdict of guilty. Fined $75.00, of which $50.00 was suspended by the Court. Defendant paid the fine.
September 19, 1969	Notice of appeal filed
October 15, 1969	Order allowing appeal signed.

I hereby certify that the above entries are all the material entries in the Court docket relating to this appeal and I annex hereto all the original papers relating to the appeal which have been filed in this Court.

DATED this 15th day of October, 1969.

Clerk of Municipal Court

1339

1339

FILED
OCT 17 1969
HELEN M. DACEY, CO. CLERK

IN THE MUNICIPAL COURT OF THE CITY OF BEND
DESCHUTES COUNTY, OREGON

THE CITY OF BEND, a Municipal Corporation,
Plaintiff,
Vs.
CHARLES ABE BERGSTRALH,
Defendant.

Case No. 15298

ORDER ALLOWING APPEAL

* * * * * * * * * * * * * * * * *

This matter coming on regularly at this time and the defendant, Charles Abe Bergstralh, having given written notice of appeal, and it appearing that the City Attorney has been served with a copy thereof,

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's appeal be and hereby is allowed.

DATED this 16th day of October, 1969.

Municipal Judge

A. C. GOODRICH
ATTORNEY AT LAW
BEND, OREGON 97701

FILED
DEC 10 1969
HELEN M. DEVEY, CO. CLERK

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

CITY OF BEND, Plaintiff, Vs. CHARLES ABE BERGSTRALH, Defendant.

Case No.

DEMURRER

* * * * * * * * * * * * * * * * *

Comes now the defendant and demurs to the complaint of the plaintiff on the ground and for the reason that the facts stated therein do not constitute a crime.

Of Defendant's Attorneys

VOL 53 PAGE 312

FILED
MAR 2 1970
HELEN M. DACEY, CO. CLERK

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

CITY OF BEND,
Plaintiff,
vs.
CHARLES ABE BERGSTRALH,
Defendant.

Case No. 16499

ORDER OF DISMISSAL

The above entitled matter having come on for trial on appeal from the Municipal Court of the City of Bend, State of Oregon, and the plaintiff appearing by and through its attorney, Dennis Karnopp, and the defendant appearing by and through his attorneys, Alva Goodrich of Bend, Oregon, and James F. Bodie of Prineville, Oregon. At the time the case was called for trial, the defendant entered a plea of "not guilty" and further pleaded a former judgment of acquittal of the crime charged. The Court then examined the Court records and it appeared to the Court that in the transcript submitted to this Court was a record of the Court of the City of Bend showing that the defendant herein had been acquitted of the crime of resisting arrest, and the Court being of the opinion that the plea of former judgment of acquittal of the crime charged should be allowed.

NOW, THEREFORE, IT IS HEREBY ORDERED That the above entitled cause be and the same is hereby dismissed.

IT IS FURTHER ORDERED That the defendant's bail be refunded in the above entitled cause to the defendant.

DATED this 2nd day of March, 1970.

CIRCUIT JUDGE

BODIE, DOTSON & OLANTZ
ATTORNEYS AT LAW

Bend man charges police brutality

By Bob Gaston
Bulletin Staff Writer

Bend City Attorney Ron Marceau said this morning that he is "pretty confident" the city can successfully defend a $200,000 police brutality suit filed against it in U.S. District Court.

The suit, served yesterday afternoon, names the city and Gayle Lowe, a former Bend police officer, as defendants. Lowe is now a State Police officer in Eugene.

The plaintiff is Charles Bergstralh, of Bend. He and his wife, Mary, operate the Hawthorne House appliance and furniture store at Third Street and Greenwood Avenue in Bend.

Bergstralh was arrested for disorderly conduct and later charged with resisting arrest following an incident May 14, 1969, in the parking lot of his store, the former old Wagner's Market.

On July 14, 1969, a Municipal Court jury found him guilty of resisting arrest and innocent of the disorderly conduct charge.

Testimony at the trial indicated the incident began when three youths rolled their stalled car into Bergstralh's parking lot. Bergstralh came out and accused them of leaving beer bottles on the lot. They said they had not.

Bergstralh was cursing the youths when Lowe, on patrol, drove by, stopped and told Bergstralh to stop cursing. Bergstralh then cursed Lowe and threw beer bottles into the street.

Lowe placed Bergstralh under arrest. A scuffle followed after Bergstralh resisted. Lowe required help from the three youths to handcuff Bergstralh.

Bergstralh charges Lowe with physical assault by "pushing, shoving and handcuffing" him. He seeks $15,000 for injuries allegedly suffered during the arrest, and $50,000 for punitive damages.

Bergstralh's suit further charges that the arrest was unlawful, and that it caused him mental anguish, humiliation and damage to his business and reputation. He is seeking $85,000 general damages on that count. He seeks another $50,000 punitive damages for the defendant's "unlawful, malicious and willful" acts.

Marceau noted that Bergstralh testified in court that Lowe had been polite before the incident erupted into a scuffle.

Marceau said that the city will probably defend Lowe, who learned of the suit when Marceau called him yesterday.

The city carried a $10,000 false arrest policy through Lloyds of London, but it may not apply in this case, Marceau said. Marceau said the city will "possibly, but probably not" be covered by insurance.

The suit, which involves alleged violation of civil rights under the Fourteenth Amendment to the U.S. Constitution, is under jurisdiction of the U.S. District Court in Portland. Marceau said he expects it to come to trial within six months.

Bend man links arrest to losses

By JAMES SOUTHWELL
of The Oregonian staff

A Bend appliance store owner told a U.S. District Court jury Tuesday he can no longer function as a successful businessman as a result of an arrest three years ago for disturbing the peace.

"The humiliation I've experienced and the distress I've felt over these years have changed me and my mental attitude toward selling. I will never attain what we wanted because I'll never live this down."

Charles Abe Bergstralh, a Bend resident for more than 30 years, testified for nearly two hours Tuesday afternoon during the second day of trial in his $200,000 law suit against the policeman and the City of Bend.

A jury of four women and two men is hearing the case.

Bergstralh contends he was falsely arrested the evening of May 14, 1969, after an altercation with three young men he claims were drinking beer on his property and urinating on appliances he had standing outside his store.

Bergstralh testified, however, that when then-Bend policeman Gayle Lowe happened on the scene, he refused Bergstralh's demands to arrest the trio and instead attempted to take the plaintiff into custody.

A struggle ensued after Bergstralh refused to accompany Lowe to the police station.

"I simply told him that I did not wish to leave my store unattended with all the merchandise out but that I would go peacefully if I could call my wife and come down," Bergstralh testified.

Lowe, who now is an Oregon State Police officer in Coquille, then summoned the assistance of the three young men to help handcuff the plaintiff, and he was taken to city jail.

Bergstralh was later acquitted by a Municipal Court jury of a charge of disorderly conduct but was found guilty of resisting arrest. The latter verdict, however, was reversed on a technicality by the Deschutes County Circuit Court.

Much of Tuesday's testimony consisted of Bergstralh and, earlier, his wife describing the decline in their business fortunes after news spread about his arrest.

"It was constantly brought up wherever we went, and customers would refer to it when they came in the store," Bergstralh said.

"Even today, at least 50 per cent of my friends, when they see me, ask how my trouble with the city came out.

"Just the mention of this affair, now, ruins my day and distresses me terribly," Bergstrahl said.

Mrs. Bergstrahl told the court that the store's business began to fall off in mid-1969 and still hasn't recovered.

"The way our business had been going in 1968, we thought we could easily have attained $300,000 in gross sales in 1969," Mrs. Bergstrahl said. "But then the arrest happened and there was a terrible slump. It was really amazing.

Bergstralh said they had to borrow money to operate the store in 1971 and even considered declaring bankruptcy.

The defense is expected to call two witnesses, including Officer Lowe, before the jury retires for deliberation Wednesday.

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DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES BERGSTRALH,
Plaintiff-Appellant,
vs.
GAYLE LOWE and CITY OF BEND, OREGON,
Defendants-Appellees.

No. 72-2820

MEMORANDUM OPINION

[August 6, 1974]

Appeal from the United States District Court
for the District of Oregon

Before: CHAMBERS, HUFSTEDLER and WALLACE, Circuit Judges

Bergstralh seeks to recover damages under section 1983 of the Civil Rights Act, 42 U.S.C. § 1983, resulting from his arrest on charges of disorderly conduct by Lowe, a policeman employed by the City of Bend Oregon. Bergstralh summoned Lowe to remove two alleged trespassers from his appliance store parking lot. When Lowe convinced the young men to leave and refused to arrest them, Bergstralh threw some beer bottles and made threatening and abusive remarks to Lowe and the young men. Lowe arrested Bergstralh without a warrant and charged him with disorderly conduct. Bergstralh was subsequently acquitted on that charge by a municipal court, but convicted on a charge of resisting arrest. In the district court, Bergstralh asserted that Lowe violated his Fourth and Fourteenth Amendment rights by using excessive force and illegally arresting him. The district court ruled at the conclusion of Bergstralh's case-in-chief that, as a matter of law, the arrest was made with probable cause. The question of excessive force was submitted to the jury, which returned a verdict in favor of Lowe. Bergstralh now appeals, urging that the district

court erred in its ruling on probable cause and in instructing the jury. We affirm.

Bergstralh's primary claim is that because probable cause was absent, Lowe deprived him of his constitutional rights by illegally arresting him. The lawfulness of a state arrest by state police is to be determined by state law so long as the state law is not inconsistent with the federal Constitution. *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969). *See Van Camp v. Gray*, 440 F.2d 777 (10th Cir. 1971). Bergstralh does not argue that the Oregon laws governing arrest, if followed, are unconstitutional. Thus, our only task in this case is to determine if the district court's ruling on probable cause was proper under Oregon law.

Bergstralh argues that since under Oregon law a police officer can make a warrantless arrest for a misdemeanor only when a crime is attempted or committed in his presence, his acquittal on the disorderly conduct charge by the municipal court conclusively establishes that his arrest was improper and entitles him to a civil judgment. We reject this argument as being without merit. *Beauregard v. Wingard*, 362 F.2d 901 (9th Cir. 1966). As the Supreme Court said in *Peirson v. Ray*, 386 U.S. 547, 555 (1967):

> Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved. . . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. (citations omitted)

During a pretrial conference in chambers, the district court, relying upon *Hryciuk v. Robinson*, 213 Or. 542, 326 P.2d 424 (1958), and Restatement of Torts § 667(1) (1938), ruled that Bergstralh's conviction for resisting arrest conclusively established that the arrest was made with probable cause unless Bergstralh could show that his conviction was obtained by fraud, perjury or other corrupt means. When Bergstralh was asked whether he intended to attempt to establish that the conviction fell within one of the exclusions, the proceedings went off the record. Thus, we are unable to determine toward which issues Bergstralh's evidence was directed.

After Bergstralh had presented his case-in-chief, Lowe moved for a directed verdict. The court denied the motion, but "rule[d] as a matter of law [that] there was probable cause for the arrest." The court then stated, "I think the only question the Court feels there is any evidence on . . . is whether excessive force was used in placing [Bergstralh] under arrest." In response to Bergstralh's argument against the ruling, the court stated: "You are ignoring entirely the evidence by the other witnesses which you called as part of your case, all of whom said the bottles went out into the street. You have got a conflict certainly that would give the officer probable cause to arrest this man."

It is unclear to us whether the court's ruling was based upon Bergstralh's failure to rebut the presumption adopted during the pretrial conference or upon all of the evidence presented during the case-in-chief. Clearly, the presumption was not rebutted and, therefore, any alternative holding would be unnecessary and thus any error in ruling on the alternative ground would be harmless.

Whether a rebuttable presumption should be applied is a matter of substantial law. *Cf. Blue Diamond Coal Co. v. United Mine Workers*, 436 F.2d 551 (6th Cir.), *cert. denied*, 402 U.S. 929 (1970); *Peterson v. Mountain States Telephone & Telegraph Co.*, 349 F.2d 934 (9th Cir. 1965). Accordingly, we are required to apply the Oregon presumption when testing the legality of an Oregon arrest, unless such an application would be inconsistent with the Constitution. *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959). Although *Hryciuk v. Robinson*, 213 Or. 542, 326 P.2d 424 (1958), and the Restatement of Torts both deal with a presumption for probable cause in a malicious prosecution by a private citizen, not probable cause for arrest by a police officer, the *Hryciuk* presumption as applied in this case does not deprive Bergstralh of his constitutional rights. The trial judge concluded that the municipal court jury in reaching a verdict of guilty for resisting arrest would have had to have concluded that Lowe had probable cause to believe that a misdemeanor was being committed in his presence. He was correct. As there was no statute to the contrary,[1] Bergstralh was entitled to use all force reason-

[1]In 1971 (subsequent to this case), a statute was adopted which prohibited the use of physical force to resist an arrest when the person has reasonable cause to believe that the arrest is being made by a police

ably necessary to resist an unlawful arrest. *United States v. Ii Re,* 332 U.S. 581, 594 (1948); *Basista v. Weir,* 340 F.2d 74 (3d Cir. 1964). Thus, in order to conclude that Bergstralh was guilty of resisting arrest, the jury would have had to have concluded that his arrest was legal. Absent probable cause the arrest could not have been legal; thus, the issue was directly resolved by the jury. Since this issue had been resolved against Bergstralh by a jury, it was not error for the trial judge to conclude as a matter of law that there was probable cause, unless Bergstralh could show that the jury verdict was obtained by fraud or perjury. Bergstralh has not succeeded in so showing.

As to instructions, we cannot review Bergstralh's claim that the district court erred in failing to instruct the jury that the acts of the three men who assisted Lowe in arresting Bergstralh should be considered in determining whether the force used was reasonable and in failing to instruct the jury that taking Bergstralh to jail was not a necessary element of the arrest. Bergstralh did not specifically assert these errors in the district court proceedings. *See* Fed.R.Civ.P. 51; *Sears v. Southern Pacific Co.,* 313 F.2d 498, 505 (9th Cir. 1963).

Bergstralh's remaining allegations of error are without merit. The court did not err in refusing to give a specific instruction that, in some circumstances, no force at all is necessary for an arrest since its instruction on reasonable force was sufficient to alert the jury to that possibility. The court also did not err in instructing the jury that reasonable force is determined by what force Lowe believed was necessary because the court expressly stated that the test was whether that belief was reasonable under the circumstances. The court adequately distinguished between Loew's belief and whether that belief was reasonable.

AFFIRMED.

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officer, whether the arrest is lawful or unlawful. ORS § 161.260 (1971). At the same time, a statute was also adopted which provided that it is not a defense to a crime of resisting arrest that the peace officer lacked legal authority to make the arrest. ORS § 162.315 (1971). Under the present Oregon laws, a conviction for resisting arrest would, of course, not be evidence of probable cause for the arrest.

CHAMBERS, Circuit Judge, concurring:

I concur in the result reached by Judge Wallace but for the following reasons.

The vindication of federal rights under 42 U.S.C. § 1983 is to be determined by federal law.[1] See Donovan v. Reinbold, 433 F.2d 738, 742 (9th Cir. 1970). Several arrest cases similar to this case have so held. Sullivan v. Murphey, 478 F.2d 938, 972 (D.C. Cir. 1973); Martin v. Duffie, 463 F.2d 464, 467 (10th Cir. 1972); Anderson v. Hass, 341 F.2d 497, 499 (3d Cir. 1965); see Mueller v. Powell, 203 F.2d 797, 800 (8th Cir. 1953). As stated by the Supreme Court in McNeese v. Board of Education, 373 U.S. 668, 674 (1963):

> "Nor is the federal right [to be redressed under § 1983] in any way entangled in a skein of state law that must be untangle before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law."

But that general rule does not resolve this case. A judgment of the district court which is correct must be upheld on appeal even if it was not decided on the best grounds. Brizendine v. Visador Co., 437 F.2d 822, 829 (9th Cir. 1971); Tanimura v. United States, 195 F.2d 329, 330 (9th Cir. 1952). The application of federal law by the district court would have mandated the result which it reached using state law.

The dissenter characterizes the issues of good faith and probable cause as defenses for which the burden of proof is borne by the defendants, but the analysis does not seem to consider the distinction between this case and the cases such as Pierson v. Ray, 386 U.S. 547 (1967). The difference is that which must be shown in order to establish a prima facie case. In cases such as *Pierson* the plaintiff is able to establish a prima facie case without reference to probable cause because the violation of a constitutional

[1] "This is not to say that federal courts do not look to state decisions in formulating a federal standard in civil rights actions. The important point is that federal courts are not bound by the decisions of the state court . . ." Martin v. Duffie, supra at 468.

right results from an arrest for violation of an unconstitutional law. In the present context the violation of a constitutional right results, if at all, from an arrest without legal justification. The proper resolution of the good faith and probable cause issues in cases involving arrests allegedly made without legal justification was demonstrated in Martin v. Duffie, supra, at 469:

> "It is true that the burden was on the plaintiff to establish an invasion of his rights: an unlawful arrest. He did so by showing arrest and confinement without a warrant and without other justification. The plaintiff having established a prima facie case, the initiative passed to the defendant to go forward with evidence showing justification. Ultimately the plaintiff had what is often described as the risk of nonpersuasion on the issue of lack of probable cause . . .[6]"
>
> "6. We are mindful that there may be instances in which the plaintiff's evidence itself creates an issue of fact, but this is not one of them . . ."

In this case Bergstralh not only failed in his burden but his evidence established the existence of probable cause for the arrest.[2] The withdrawal of that issue from the jury was therefore proper.

HUFSTEDLER, dissenting:

The key issue is whether the district court erred in ruling as a matter of law that Bergstralh had failed to make a prima facie showing that he had been illegally arrested. The district court took the probable cause issue from the jury on two grounds: (1) Under Oregon law, applicable to this civil rights action, Bergtralh's conviction for resisting arrest created a presumption that the arrest was supported by probable cause, absent proof that the conviction was obtained by fraud, perjury, or other corrupt means, and (2) testimony of some of Bergstralh's witnesses would have supported a finding of probable cause. Neither ground is sustainable.

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[2]The district judge's admonition to Bergstralh that he was ignoring the testimony of his own witnesses that established probable cause for the arrest demonstrates that the judge may indeed have applied the proper federal standards in reaching his decision.

As my brother Chambers recognizes, the Oregon presumption, if any there be,[1] cannot be applied to the federal right here asserted. He asserts, however, that the district court's erroneous reliance on the presumption was harmless error because Bergstralh did not prove a prima facie case of illegal arrest under federal law standards. We cannot be sure that the district court would have taken the issue from the jury had it been aware that the Oregon law was inapplicable—although the record strongly indicates that he would not have done so; therefore, we cannot properly say that the error was harmless.

Even if the district court had completely disregarded the presumption, the record does not support the removal of the issue from the jury. This case presents the situation described in the footnote that my brother Chambers quotes from *Martin v. Duffie* (10th Cir. 1972) 463 F.2d 464, 469 n.6: "[T]here may be instances in which the plaintiff's evidence itself creates an issue of fact. . . ."[2]

---

[1]The district court concluded that Oregon had adopted Restatement of Torts § 667. Section 667 states that, in a malicious prosecution action probable cause is to be presumed from proof of the fact that the arrestee was convicted of the offense for which he was arrested, absent proof of taint in obtaining the conviction. The district court's conclusion was based on Hryciuk v. Robinson (Ore. 1958) 326 P.2d 424. *Hryciuk* held that commitment by a magistrate was prima facie evidence of probable cause to arrest in a malicious prosecution action; it distinguished Trullinger v. Dooly & Co. (Ore. 1928) 266 P. 909 which held that proof of conviction was conclusive proof of probable cause in a malicious prosecution action. The vitality of *Trullinger* is dubious, but even if *Trullinger* survives, neither that case nor *Hryciuk* adopted section 667. To the extent that *Trullinger* is the law of Oregon, it is an adjunct of its substantive law of malicious prosecution; it is not a part of the Oregon law of arrest. The effect of the presumption is to foreclose recovery for malicious prosecution, even if the arrest was without probable cause, when that arrest was followed by a conviction that is immune from attack on the specified grounds. Moreover, neither Oregon law nor the Restatement purported to formulate a rule applicable to a cause of action that resembles a federal civil rights action .

[2]The court in *Martin* held that the plaintiff's proof of a warrantless arrest, the officers' fruitless prior searches, and the subsequent filing of charges later dismissed established prima facie want of probable cause. The plaintiff was not required "to search out the subjective viewpoints of the arresting officers in a quest for information as to whether probable cause in a practical sense existed." (*Id.* at 468.) "[G]ood faith

Bergstralh was arrested without a warrant, and no justification for the arrest existed unless he had committed a misdemeanor in the arresting officer's presence. The only misdemeanors that appear to have been potentially in that category were Bergstralh's throwing bottles into the street and his resistance to an arrest accomplished without excessive force. The testimony on both the bottle episode and the amount of force used to arrest him was conflicting. None of the evidence was inherently incredible. The conflicts were of the garden variety that are the common accompaniment of the testimony of eye witnesses who perceive and recall the same event differently. Resolution of those conflicts was a task for the jury.

I would reverse and remand for a new trial.

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and probable cause [are] defenses," and are so characterized in Pierson v. Ray (1967) 386 U.S. 547. (463 F.2d at 468.) Our problem did not arise in *Martin* because the evidence in the plaintiff's case-in-chief was not conflicting, and the trial was without a jury.

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JUDGMENT

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United States Court of Appeals
FOR THE NINTH CIRCUIT

CHARLES BERGSTRALH,

Plaintiff-Appellant,

vs

GAYLE LOWE and CITY OF BEND, OREGON,

Defendants-Appellees

No. 72-2820
DC # 71-337

APPEAL from the United States District Court for the _____
District of OREGON

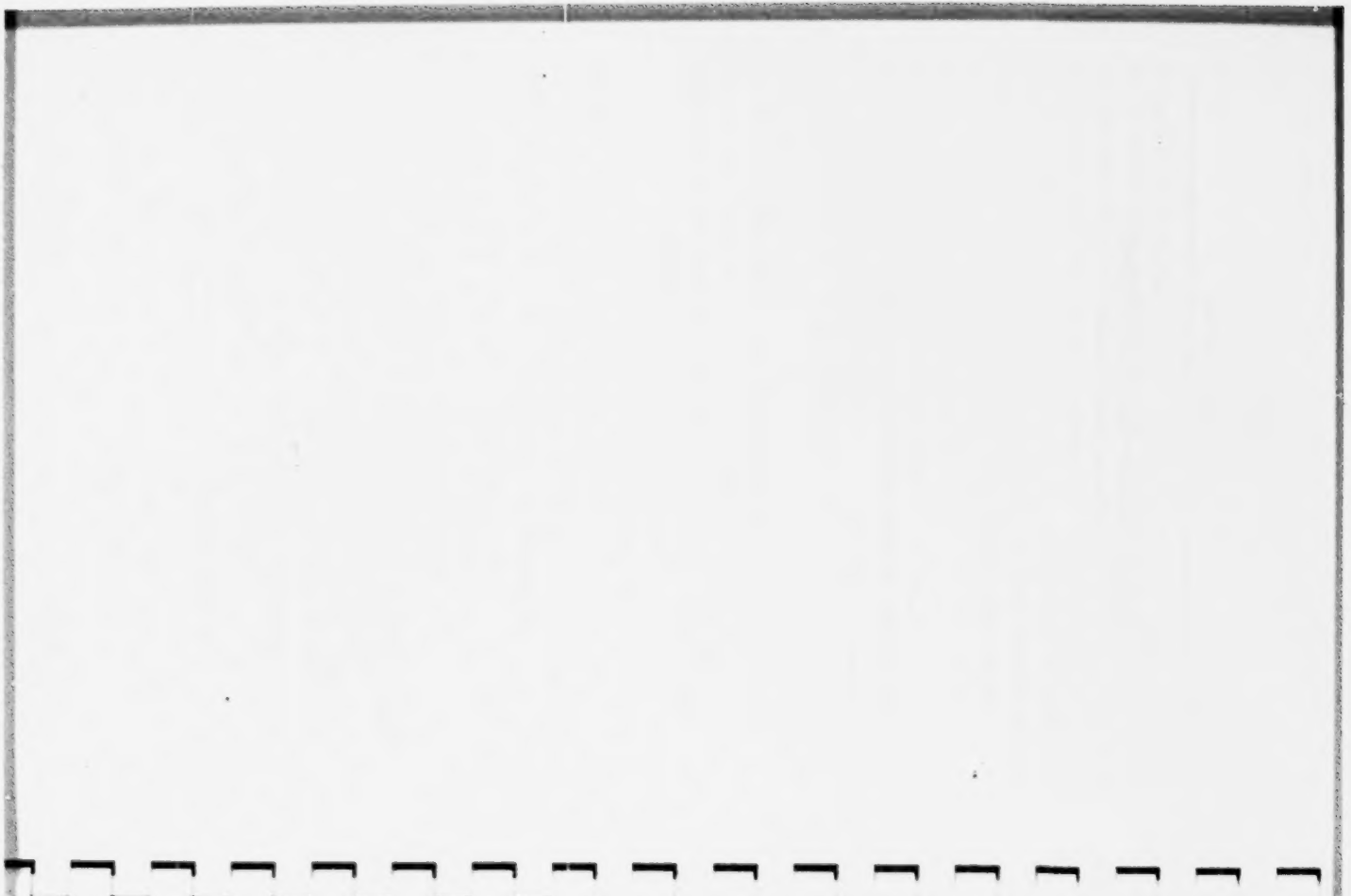
THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of OREGON

_____

_____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is AFFIRMED

Filed and entered AUGUST 6, 1974



Supreme Court of the United States

No. A-371

CHARLES BERGSTRALE,
Petitioner

v.

GAYLE LOWE AND THE CITY OF
BEND OREGON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 3, 19 ~~74~~ 75

S/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of November, 19 74

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No. 74-826

In the Supreme Court of the United States

CHARLES BERGSTRALH,

Petitioner,

v.

GAYLE LOWE and CITY OF BEND, OREGON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. 74-826

In the Supreme Court of the United States

CHARLES BERGSTRALH,

Petitioner,

v.

GAYLE LOWE and CITY OF BEND, OREGON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The District Court judgment was based upon a jury verdict. The opinion of the Court of Appeals for the Ninth Circuit, the concurring opinion and the dissenting opinion (App. D of Petition) are not found in the Federal Reports.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether there was probable cause for petitioner's arrest.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

"§ 1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

This litigation concerns the legality of petitioner's arrest by respondent Lowe, a police officer employed by the City of Bend. The city is no longer a party to the case.

Petitioner's witnesses testified that he was loud, abusive and threatened them with bodily harm (R. II, p. 43, R. III, p. 175). Respondent Lowe, a city policeman, was, at one point, required to step in to prevent petitioner from attacking one of the witnesses (R. II, p. 46). Petitioner would not calm down and eventually, according to all the witnesses except pe-

titioner, threw empty beer bottles into the adjoining four-lane highway (R. II, pp. 47, 73, 74, 75, 95).

Petitioner was placed under arrest but refused to go with respondent Lowe (R. III, pp. 189, 190). Eventually petitioner dragged respondent Lowe into the parking lot and took him down to the ground (R. III, pp. 218-220). With help, petitioner was handcuffed and taken to jail (R. I, p. 61; R. II, p. 98).

Tried on two charges by a jury in Municipal Court, petitioner was acquitted of disorderly conduct but convicted of resisting arrest (R. III, p. 194). Due to a clerical error, the conviction was recorded as an acquittal and when the case was appealed by petitioner to a higher state trial court, the charge was dismissed on petitioner's motion based upon former jeopardy.

This case was filed in Federal District Court alleging that petitioner's civil rights were violated as proscribed by 42 U.S.C. 1983. The contentions involved false arrest and assault and battery. The Federal District Judge ruled that there was probable cause for the arrest but submitted the assault and battery contentions to the jury which resolved those issues in favor of respondent.

ARGUMENT

The issue in the present case is too narrow to warrant review by this Court on certiorari. The sole question properly presented here is whether the District

Court, on the particular and somewhat peculiar facts of this case, properly withdrew the issue of false arrest from the jury. The Ninth Circuit Court of Appeals found the District Court's ruling to be correct on two grounds.

The District Court was overly patient with petitioner in allowing him to present any and all evidence he could in support of his contentions.

Petitioner's main complaint seems to be directed toward alleged improprieties in the proceedings against him tried in the Municipal Court of the City of Bend. Those issues are not properly in this case as they were resolved in the Circuit Court for the State of Oregon. Petitioner's apparent concern that he was denied the opportunity to be exonerated of criminal charges by a jury is misplaced in view of the fact that he was the beneficiary of a ruling, on his motion, which resulted in those charges being dismissed.

On the individual facts of this case the rulings of the District Court were manifestly correct. There is no real conflict in decision and no important question of Federal law requiring decision by this Court. This is merely a case where, as stated in the concurring opinion, petitioner not only failed in his burden of proof but his evidence also established the existence of probable cause for the arrest which therefore required the withdrawal of that issue from the jury.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

MORRISON, DUNN, COHEN, MILLER & CARNEY

By /s/ Thomas H. Tongue
THOMAS H. TONGUE
Of Attorneys for Respondent

January 15, 1975

I hereby certify that I served the foregoing Respondent's Brief on Charles Bergstralh, petitioner, on the .....day of January, 1975, by mailing to said petitioner three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said petitioner at his address, to-wit: Box 961, Bend, Oregon 97701, and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is a regular communication by U. S. Mail.

DATED this .....day of January, 1975.

MORRISON, DUNN, COHEN, MILLER
& CARNEY

By .....
THOMAS H. TONGUE
Of Attorneys for Respondent